Europaudvalget
(Alm. del - bilag 263)
udenrigsministerråd
(Offentligt)

URU, Alm. del - bilag 78 (Løbenr. 5684)

Medlemmerne af Folketingets Europaudvalg

og deres stedfortrædere

Bilag	Journalnummer	Kontor	
1	400.C.2-0	EU-sekr.	26. november 2002

Til underretning for Folketingets Europaudvalg vedlægges EU's konceptpapirer vedrørende: Særlig og fordelagtig behandling, Investering/udviklingsbestemmelser, Investering/tvistbilæggelsesbestemmelser, Multilateralt system for notificering og registrering af geografiske betegnelser.

Materialet er sendt til WTO.

World Trade Organization	
	TN/CTD/W/13 1 August 2002
	(02-4259)
Committee on Trade and Development **Special Session**	Original: English

submission for the Committee on Trade and Development -

Special Session on Special and Differential Treatment

Communication from the European Communities

The following communication, dated 26 July 2002, has been received from the European Communities

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The Doha mandate

The EC welcomes the review of WTO special and differential (S&D) treatment as mandated by paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the Decision on Implementation-Related Issues and Concerns.

The Doha Decision on Implementation-Related Issues and Concerns outlines three pillars of work towards the objective of strengthening S&D treatment provisions and making them more precise, effective and operational: (i) identify those S&D treatment provisions that are already mandatory in nature and those that are non-binding in character and identify those provisions that Members consider should be made mandatory"; (ii) consider ways in which S&D treatment provisions can be made more effective, including especially ways in which developing countries, in particular the least-developed countries, may be assisted to make use of S&D treatment provisions; (iii) consider how S&D treatment may be incorporated into the architecture of WTO rules.

The three pillars of the work programme

Mandatory/non-mandatory S&D treatment

The identification of provisions that Members consider should be made mandatory must be seen against the objective of strengthening S&D treatment provisions and making them more precise, effective and operational; as such it is a means to reach this objective and not an end in itself. In some cases, making provisions mandatory will not be instrumental in meeting the overall objective. Similarly, the EC wishes to recall that there are other ways to reach that same objective and suggests that Members broaden their attention to include the instruments that prove most appropriate in relation to the overall objective. This is not meant to exclude the option of making any given S&D treatment provisions mandatory, as mandated by paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, but to avoid confusing the means with the end.

Assisting developing countries in making best use of s&d treatment provisions and s&d treatment in the architecture of WTO rules

The EC recalls the mandate to look at all ways to assist developing countries in making best use of S&D treatment provisions, including by information flows and technical assistance. The inter-relation between different S&D treatment instruments and provisions is relevant to this. In particular, making better use of S&D treatment requires better synergy and co-ordination between different S&D treatment instruments, e.g. how to make bet ter use of transition periods to prepare implementation by providing targeted technical assistance and capacity building to countries that need such assistance. Transition periods may in this situation be seen as a function of the rules in question, the level of development of the implementing country and the capacity building efforts made and provided.

The EC therefore suggests that, in pursuing its work on cross-cutting issues, the CTD Special Session address as a priority the issue of how to ensure synergy and co-ordination of S&D treatment provisions as a central instrument in making S&D treatment provisions more effective and in assisting developing countries in making use of S&D treatment provisions. This should look at both existing and new S&D treatment provisions, and could touch upon the S&D treatment instr uments, their structures and administration, as well as the possibility for a more differentiated application of S&D treatment to take account of the different constraints that countries at different levels of development face in relation to the implementation and use of specific WTO rules, and in light of the overall development objectives of the Doha Work Programme.

Moreover, the inter-relation between different S&D treatment provisions and instruments is linked to the issue of the incorporation of S&D treatment in the overall WTO architecture, i.e. their place and function in WTO Agreements, current or future, and should therefore be considered together with these other questions. Accordingly, the first element of the work programme on S&D treatment, relating to mandatory/non-

mandatory nature of provisions, only makes sense if seen as p art of a comprehensive agenda to achieve effectiveness of S&D treatment provisions, as underlined by the Least-Developed Countries in their communication (TN/CTD/W/4).

The relation between the S&D treatment work programme and other elements of the doha development agenda work programme

The EC recalls the link between the work programme on S&D treatment and the overall WTO Doha Work Programme, as stated in paragraph 50 of the Doha Ministerial Declaration. In particular, the EC notes that the work of the CTD in Special Session will be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees. Similarly, the EC notes that questions that have been dealt with in substance by the Decision on Implementation-Related Issues and Concerns, would not merit reopening by the CTD Special Session. S&D questions now being addressed in the negotiations (e.g. on Rules) also would not need to be separately addressed in the CTD although the CTD should be aware of those discussions so that coherence of approach can be maintained in accordance with paragraph 51 of the Doha Ministerial Declaration.

As regards market access, the EC recalls that the negotiation mandates under the Doha Ministerial Declaration fully integrate the need for S&D treatment, thus reflecting the principles of Part IV of GATT 1994. It should not therefore be necessary within the present S&D treatment exercise to address the substance of those market access negotiations, but rather to use it to ensure that the S&D treatment aims set out in the different market access mandates are pursued in the man ner intended.

Members' suggestions on specific provisions

The EC welcomes the submission of specific recommendations by Members (TN/CTD/W/1 to 4) and the recommendation to continue the analysis and examination of these proposals in the Special Session of the CTD. The EC will consider each specific suggestion and provision with an open spirit, on its merits, and in line with the mandate for this exercise. The EC will address those specific suggestions separately in the pursuit of the work of the Special Sessi on. The EC suggests that the primary aim of the Special Session in doing so must be to ascertain whether the proposal, if implemented, will aid the integration of developing countries into the multilateral trading system. At the same time, account must be taken of the feasibility of each proposal in legal and practical terms, of which Members or categories of Members should benefit from any strengthened provision, and of whether or not within the Doha Development Agenda Work Programme the issue is already being addressed.

Issues for further consideration by the CTD special session

Analysis of the overall objectives of s&d treatment in wto rules

As a first step, the EC suggests that the CTD analyse the overall objectives of S&D treatment. Such analysis should build on the useful work carried out by the WTO Secretariat in WT/COMTD/W/77/Rev.1 and include both immediate and longer-term perspectives of S&D treatment provisions in existing and future agreements. Work should also consider the expectations of developing countries with respect to S&D treatment supporting their integration into the multilateral trading system: how can S&D treatment lead to integration and not exclusion? In this context, the EC recalls the principle of common but differentiated responsibility, and the need for all Members to participate in and contribute to the multilateral trading system, whether it be by demonstrating political will in the assumption of commitments, by providing and implementing technical assistance, or further market opening, or by carrying out appropriate domestic policies, in order to maximise the benefits for all Members.

A clearer definition and understanding of the overall objectives of S&D treatment can help assess the effectiveness of alternative S&D treatment measures and identify the most effective instruments to meet those objectives, and focus attention on areas and countries, where these instruments are most needed. In this context, attention should be given to the current utilisation by developing countries. This broader analysis of S&D treatment objectives can help point to means o f fundamentally improving the present approach, as

indicated by the African Group in their submission. The exercise would also be useful in identifying cases where provisions have been implemented, but where the expectations in terms of result have not been met because of other circumstances. In particular, and as the African Group points out in their communication, the development needs of developing and least-developed countries require special domestic policies, measures and laws as well as assistance. The EC believes that recommendations flowing from this broader exercise should go beyond the "provision by provision" approach, which has been pursued so far, thus addressing the broader concept, objective and mechanism of S&D treatment in WTO agreements.

Interaction of s&d treatment instruments and their integration in WTO agreements

A second element, which is relevant both for the ability of developing countries to benefit from S&D treatment and for incorporating S&D treatment in the WTO architecture, is the question of how different SDT instruments interact and how they are integrated into specific agreements. To take an important practical example: technical assistance is a central S&D treatment instrument, because it is one of the means to assist countries to meet commitments (as well as to benefit from opportunities offered in other markets). Technical assistance should, however, be designed and implemented in conjunction with decisions on the application of transition periods for the assumption of commitments, which in turn depends on the type of commitment in question and the objective situation and needs of the country in question.

WTO Members are committed to improving the quantity, quality and co-ordination of trade-related technical assistance and capacity building. The EC suggests that these efforts be seen as an integral part of the review of S&D treatment in the WTO.

Taking account of the needs, interests and specific circumstances of countries

It has often been stressed that S&D treatment should not rely on arbitrary or blanket provisions, but be designed to reflect the needs of countries at different levels of development. We agree. The exercise should therefore consider how best to take account of such differentiated needs of developing countries in relation to both market access and WTO rule making. Understanding the needs and interests of countries in view of their specific circums tances will allow the trading system to better address those needs in relation to specific agreements. In particular, the needs, interests and specific circumstances of least-developed countries tend to be very different from those of most other developing countries. The EC therefore has doubts about the approach taken in some of the submissions made on SDT which present proposals across the board – for example sweeping and potentially permanent exemptions for all developing countries - without taki ount of the objectively different needs of countries at different developmental levels.

Taking account of the different nature of wto commitments

The various WTO agreements, existing and future, are different in nature and imply different levels of capacity to implement. Whereas certain commitments may imply significant resources and infrastructure, others may be implemented and applied with relative ease. Such differences should be taken in account when determining appropriate S&D treatment instruments for countries whose capacities differ.

Relation between wto s&d treatment and other support measures

A fifth and final element for consideration could be the relation between WTO S&D treatment provisions and measures that are taken by other organisations or donors to support the development of developing countries – notably those measures that assist their integration in the multilateral trading system and the global economy. In particular, the role of trade-related assistance and capacity building and the complementarity of WTO efforts and by other donors need to be addressed in order to maximise efficiencies of scale, and strengthen complementarity.

World Trad Organization	
	WT/WGTI/W/140 12 September 2002
	(02-4826)
Working Group on the Relationship between Trade and Investment	Original: English

communication from the european community

and its member states

The following communication, dated 10 September 2002, has been received from the Permanent Delegation of the European Commission.

Concept paper on development provisions

Note by the Secretariat

1. Paragraph 22 of the Doha Ministerial Declaration mentions "development provisions" among the issues to be clarified by the Working Group on the Relationship between Trade and Investment (WGTI), in the period until the Fifth Ministerial Conference. WTO Ministers have recognised at the Doha Ministerial Conference that the development dimension should be incorporated as a central and cross-cutting element of the Doha Development Agenda (DDA). The EC fully supports the objecti ve of having sustainable development appropriately reflected in the DDA, as provided for in paragraph 51 of the Doha Declaration and, in this context, believes that the provisions of a multilateral investment framework should take into account the specific needs and constraints of developing countries.

2. The development dimension is a horizontal concern that has been addressed in the WGTI in the context of specific discussions on scope and definition, transparency, non-discrimination and pre-establishment commitments. In addition to the written submissions already presented and the statements made during past meetings, this submission outlines some views on how a multilateral framework on FDI could incorporate development provisions.

3. In this paper we will outline some ideas on the concept of flexibility for development, existing development provisions, in particular in the GATS, and technical assistance.

Investment and development

4. Investment liberalisation should be seen as part of the broad process of regulatory reform that developing countries (as well as developed countries for that matter) have to go through in order to create an enabling business environment, while retaining their ability to regulate for public purposes.

5. It is undisputed that FDI can bring important developmental benefits to recipient countries, in the form not only of capital but also technology, knowledge, improved access to export markets, etc. An inflow of FDI can be especially important in order for developing countries to be able to reap the benefit of potential market access opportunities created by open trade policies and future unilateral or negotiated liberalisation. As a consequence, attracting foreign direct investment h as become an objective of particular importance for many developing countries. In parallel to unilateral domestic reforms most countries have concluded bilateral and regional investment treaties for the purpose of promoting and protecting investment flows with their partners.

6. At the same time, while most developing countries recognise the merit of providing an open and transparent investment climate in order to attract FDI, some of them also feel the need to maintain certain investment policies and measures aimed at promoting the development of specific sectors, regions, filling technology gaps or protecting minorities and cultural heritage. Regardless of the effectiveness or appropriateness of any specific policy, it is our firm conviction that any deve lopment policy and measures can and should be compatible with a multilateral investment framework.

7. By saying this, we believe not only that a MIF can and should be compatible with development objectives and policies, but in fact it could actually support them. Let us not forget that developed countries are both sources and destinations of the greater part of FDI flows world-wide. However, developing countries are those who most need FDI in order to make up for their lack of domestic capital and technology. A MIF would certainly benefit developing countries in particular by improv ing the legal security, transparency and credibility of their domestic framework.

8. Thus, should a MIF include meaningful provisions that enhance transparency, predictability and non-discrimination for FDI, those who will mostly benefit from it will be developing countries.

The concept of Flexibility

9. We wish to underline that flexibility for development is an important concept that should be taken into account in the negotiation of a MIF. However, if flexibility is understood as the right of a government to discriminate among investors, it will not be effective as a means to enhance development. Flexibility instead can be useful if it is seen as a broader concept which combines an appropriate policy space that governments require to pursue their national development objectives with the quest for an appropriate stable, predictable and transparent FDI framework through which firms are encouraged to operate.

10. Flexibility is to make up for insufficient financial and human resources and, in particular, institutional weaknesses which put heavy restraints on developing countries. Flexibility may typically involve: lower levels of commitments; asymmetrically phased implementation timetables; exceptions from obligations in certain areas; flexibility in the application of – and adherence to – disciplines.

11. As already discussed in this Working Group, international investment agreements can include each, or a combination of these approaches and instruments.

Some development provisions that already exist in the WTO

12. The WTO system includes a number of development provisions throughout the different agreements. The WTO Committee on Trade and Development (COMTD) has classified the different special and differential (S&D) treatment provisions in the following 6 categories: (i) provisions aimed at increasing the trade opportunities of developing countries; (ii) provisions under which WTO members should safeguard the interests of developing country members; (iii) flexibility of commitments, of action, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; (vi) provisions relating to least-developed country members.

13. A number of these provisions already apply directly or indirectly to FDI, as the WTO Secretariat explains in its paper WT/WGTI/W/119.

Flexibility as the underlying principle: the example of GATS

14. The GATS is probably one of the most "development-friendly" agreements in the WTO system because of its structure. The GATS architecture has a "built-in" mechanism, which has the same effect as and even stronger than a S&D provision, by providing complete flexibility in making commitments.

15. In fact, Article XIX spells this out by recognising that the negotiation of specific commitments shall take place with due respect for national policy objectives and the level of development of individual members. Moreover, it recognises developing countries' right to open fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation.

16. It has been noted that "*The GATS does not adopt the traditional concept of Special and differential treatment, according to which, to a large extent, all developing countries are treated the same. It rather addresses the concerns and needs of developing countries through providing appropriate flexibility on an individual basis. Such flexibility is reflected in numerous provisions of the Agreement as well as in its basic structure, which allows each Member to undertake liber alisation commitments in a manner consistent with its development needs. Such commitments are always negotiated on a case-by-case basis*".

17. We entirely share this appreciation. This is why we support the GATS-type approach as a useful model for a MIF. It is also evident that most developing countries have made ample use of the flexibility provided by Art. XIX GATS by taking fewer, and less comprehensive commitments than developed countries.

18. In the end, under this system, each country draws its own balance between the need to offer a stable, predictable and transparent policy framework to foreign investors and the need to retain a margin of flexibility necessary to pursue its specific national development objectives.

Technical assistance

19. As suggested in our submission WT/WGTI/W/102, Technical assistance and capacity building should be foreseen for the pre-negotiation phase, during the negotiations as well as the implementation of provisions that required specific additional resources for developing countries.

20. In the case of, for instance, transparency provisions, the benefits of the provisions included in a MIF would be greatly enhanced by promoting investment opportunities in a pro-active manner. Host and home countries, could benefit from transparency provisions included in a MIF, respectively as a way to inform about investment opportunities in their territory and to the advantage of their investors. Transparency and dissemination of informa tion on investment laws and regulations, should be an important element of investment promotion for all countries and in particular developing countries.

21. As we have pointed out in document WT/WGTI/W/110, technical assistance for the specific goal of improving transparency and investment promotion could build on existing projects and offer support to officials and investment promotion agencies from developing countries in terms of know-how as regards (i) identification of national legislation concerning investment, (ii) dissemination of information, and (iii) strengthening the capacity to upgrade regulatory frameworks and to mai ntain this upgrading.

Conclusion

22. Rather than only including specific development or S&DT provisions, which can certainly be useful in certain cases, we believe that the development dimension should be incorporated in the overall structure of a MIF. The end result of a MIF should be development friendly. However, the level of commitments of each country will determine the value added of an MIF for itself and its real contribution to the improvement of FDI conditions world-wide t o the benefit of development.

23. A MIF should have among its key objectives, the promotion of development and the growth of the capacity of developing countries to attract FDI flows and also to become sources of FDI.

24. As to the coverage, the agreement could focus on FDI, which is the most stable form of capital, it is widely acknowledged to be essential for development and it is one of the main engines of world trade and growth.

25. A flexible, GATS-type structure based on positive commitments could be used for market access and NT provisions at the pre-establishment stage. This mechanism would allow some countries to take phased commitments on market access and NT which would be adapted to their level of development. The level of commitments of developing countries would be commensurate to their level of development and there would be no obligation for them to liberalise sectors. Mo reover, each developing country would be able to attach to its market access and NT commitments possible conditions related to its development objectives.

26. Technical assistance should be foreseen for developing countries for all the stages, i.e. the pre-negotiation phase, the negotiation as well as for the implementation of provisions that required specific additional resources.

27. The right of members to regulate 'in order to meet national policy objectives' should be explicitly recognised, as well as possible exceptions for public interest (for example: security, protection of public moral, public order and consumers, exercise of governmental authorities) and restrictions to safeguard the Balance of Payments in accordance with IMF rules.

28. The question of investors' behaviour and their responsibility vis-à-vis host countries could also be addressed. As mentioned in our submission WT/WGTI/W/81, there is a concern of developing countries that MNEs apply high standards of behaviour, so that host countries can be in a position to reap most benefits from FDI. In our view the OECD Guidelines for multinational enterprises provide a useful example of how to ensure that MNEs conduct their activities in a responsi nner and in harmony with the policies of the countries in which they operate.

29. We look forward to continuing our discussions on the possible development provisions to be included in a MIF and to hearing other Members' views and suggestions on all the options available.

World Trade Organization	
	WT/WGTI/W/141 11 September 2002
	(02-4799)
Working Group on the Relationship between Trade and Investment	Original: English

communication from the european community

and its member states

The following communication, dated 10 September 2002, has been received from the Permanent Delegation of the European Commission.

Concept paper on Consultation and the settlement

of disputes between Members

Note by the Secretariat

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1. Paragraph 22 of the Doha Ministerial Declaration mentions "consultation and the settlement of disputes between Members" among the issues to be clarified by the Working Group on the Relationship between Trade and Investment (WGTI), in the period until the Fifth Ministerial Conference.

2. In line with all other WTO agreements, the EC believes that a future Multilateral Investment Framework (MIF) should include the possibility for members to resort to the WTO dispute settlement mechanism where they consider that other members have failed to observe their obligations under the agreement.

3. This paper outlines the dispute settlement mechanisms included in most international investment agreements and in the WTO system.

Existing dispute settlement mechanisms in international investment agreements

4. Foreign investors are subject to the laws of the countries in which they chose to operate, once they have established their activities there. Unless agreed otherwise, local courts are competent to decide on disputes involving the treatment of foreign investors. In addition to this normal domestic jurisdiction, and in order to provide additional legal protection to foreign investors, most countries, parties to bilateral investment treaties (BITs), hav e agreed to include the possibility for private investors to resort to international arbitration in cases of disputes with a host State.

5. BITs include dispute settlement in order to minimise legal insecurity and political conflicts, with a view to promote a generally favourable climate for investments among the parties. Most BITs include both a dispute settlement mechanism involving investors vis-à-vis States, as well as provisions on disputes between the contracting States. In both cases, BITs provide that the parties to a dispute should first try to solve the matter amicably, through prior consultation and ne gotiations, before initiating formal proceedings.

6. In the case of investor-to-State dispute settlement provisions, most BITs do not set up new mechanisms but allow private investors to resort, against the host country that violates the agreement, to binding international arbitration under either the

ICSID Convention or to *ad hoc* international commercial arbitration set up in accordance with the rules of UNCITRAL or the International Chamber of Commerce.

7. Individual investors are allowed to initiate an international arbitration against a host country for a violation of its international obligations on investment, only when the host country has given its consent. For instance, recourse to ICSID arbitration is only possible when the host government has voluntarily given its written prior consent. This consent may be expressed in the investment law of the host country, in the provisions of a BIT concluded with the State of origin of the foreign investor, or in any other written form. Consent may not be unilaterally withdrawn and the decision of the arbitration under ICSID is binding on the parties. It should be noted that the jurisdiction of ICSID covers any legal dispute arising directly out of an investment, between a Contracting State of ICSID and a national of another Contracting State, which the parties to the dispute consent in writing to submit to ICSID.

8. State-to-State disputes in BITs are usually subject to binding ad hoc arbitration, in accordance with standard clauses. Either party to the agreement can launch the procedure, if the matter cannot be settled through diplomatic means, in cases of disputes concerning the interpretation and/or application of the treaty. BITs may differ as to the appointment of arbitrators, the procedural rules, the applicable law, the deadlines, the allocation of costs, and the relationship between the State-to-State and investor-to-State arbitration.

Consultation and Dispute Settlement in the WTO system

9. When a WTO member considers that another member is in breach of multilaterally agreed trade rules, it may resort to the multilateral dispute settlement system instead of taking action unilaterally. The Uruguay Round strengthened the Dispute Settlement mechanism (the Dispute Settlement Understanding, DSU) and introduced clearly defined procedures and deadlines. The system is first of all designed to encourage the resolution of disputes through consult ations, which are always possible throughout the proceedings, up to the final award.

10. It is important to note that this crucial element of the multilateral trading system, which prevents the use of unilateral actions, represents an essential guarantee for the rights of all WTO members, whatever their size or level of development. The DSU contains 11 provisions specifically related to special and differential treatment.

11. The DSU fully covers the Multilateral Agreement on Trade in Goods, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights, as well as, under certain conditions, other plurilateral and multilateral WTO agreements.

12. For instance, GATS Article XXII requires each member to accord sympathetic consideration and to allow other members to consult them, in accordance with the DSU procedures, on any matter affecting the operation of the agreement. Moreover, GATS Article XXIII allows resort to the dispute settlement mechanism where a member considers that any other member fails to carry out its obligations under the agreement or where it considers that possible benefits under the agreement have been nu llified or impaired.

Conclusion

13. The WTO system includes a strong and effective consultation and dispute settlement mechanism which contributes to the fair management of disputes among Members. The GATS, which already addresses around half of world FDI flows (under mode 3) is covered by the WTO DSU. For the sake of consistency, any possible dispute concerning a future multilateral framework on FDI to be negotiated and agreed in the WTO should also be fully covered by the WTO Disput e Settlement mechanism.

14. We believe that the appropriate forum to address possible disputes arising on the interpretation and application of a future multilateral investment framework to be negotiated and agreed in the WTO context should be the existing WTO Dispute Settlement mechanism. The relationship between the DSU and the State-to-State dispute settlement provisions of bilateral or regional investment Treaties may have to be addressed.

15. We look forward to hearing other members' views on these and other possible options available to address the question of consultation and dispute settlement in the context of a multilateral investment framework.

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JOB(02)/70

Council for Trade-Related Aspects 24 June 2002

of Intellectual Property Rights

Special Session

Informal NOTE BY

The european communities and their member states

The following document was received on 19 June 2002 from the Permanent Delegation of the European Commission with the request that it be circulated to the Special Session of the Council for TRIPS.

Negotiations relating to the Establishment of a Multilateral System of Notification and Registration of Geographical Indications

Issues for Discussion at the Special Session of the TRIPS Council of 28 June 2002

the framework

Pursuant to Article 23.4 of the TRIPS Agreement, WTO Members shall negotiate in the TRIPS Council, "the establishment of a multilateral system of notification and registration of geographical indications".

Paragraph 18 of the Doha Ministerial Declaration proposes that negotiations relating to such a system shall be completed by the Fifth Ministerial Conference.

To that end, the Note by the Chairperson of 4 June 2002 (JOB(02)/49) lists some issues for discussion at the June 2002 meeting.

The Issues for Discussion

Definition of the term "geographical indications" and eligibility of geographical indications in the system (see Section III).

The purpose of the notification and registration system or how such a system can "facilitate" the protection of geographical indications (see Section IV).

What is meant by a system entailing both "notification" and "registration"? (see Section V).

Participation, or how the system should be designed to be a "multilateral" instrument and for the benefit of "geographical indications (…) eligible for protection in those Members participating in the system" (see Section VI).

tions".

The Notion of Geographical Indications

The notion of geographical indications ("GIs") is embedded in Article 22.1 of the TRIPS Agreement, which is not open for discussion. That Article reads as follows:

"Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

Geographical indications to be notified to the multilateral system should meet the requirements of Article 22.1 of the TRIPS Agreement and, in particular, the requirement that the name refers to a product "where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin". The link between the territory and the defining quality, characteristic or reputation should not be trivialised.

WTO Members have implemented the minimum requirements of that notion according to the respective legal orders. Yet, there should be the possibility for WTO Members to prevent legal effects of the registration of GIs in their territory where there is *prima facie* evidence that the notified name is blatantly not in conformity with the definition of GIs of Article 22.1 TRIPS.

Furthermore, Article 24.9 of the TRIPS Agreement establishes that WTO Members need not protect geographical indications "which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country".

In addition, Article 24.6 of the TRIPS Agreement enables WTO Members not to protect geographical indications that have become "the term customary in common language as the common name for such goods or services in the territory of that Member".

Consequently, the multilateral system should allow that countries, if they wish so, to remain unaffected by the registration of those names falling under the provisions referred to in paragraphs 10 to 12 above.

The proposals made by the EC and their Member States (IP/C/W/107/Rev.1) and Hungary (IP/C/W/255) contemplate such a mechanism via an "opposition" procedure. As designed, for example, in the EC proposal, WTO Members would be free to challenge those names that, *prima facie*, do not meet the requirements of Article 22.1 of the TRIPS Agreement and will be free to protect those that are not protected in the country of origin, or have become "the term customary in common language as the common name for such goods or services" if they choose to do so.

Under the proposal of Canada, Chile, Japan and the United States (IP/C/W/133/Rev.1), this question is unclear. The proposal seems to allow for the notification of GIs that do not meet the requirements of Article 22.1 of the TRIPS Agreement (i.e., a hypothetical GI "Wine of the European Union") and yet national authorities would be obliged to refer to it.

"Facilitating" the Protection of Geographical Indications

The protection of geographical indications enshrined in Section 3 of Part II of the TRIPS Agreement must be provided by law in all WTO Members. Right holders, consumers and administrations alike have a genuine interest in gaining easier access to those legal means that the TRIPS Agreement makes available for them in order to prevent misuse of GIs in their markets.

According to Article 1 of the TRIPS Agreement, WTO Members are free to choose the means to implement the requirements of the TRIPS Agreement. As set out in the composite paper prepared by the WTO Secretariat summarising the responses to the checklist of questions issued under Article 24.2 of the TRIPS Agreement (IP/C/W/253), GI protection has been implemented via GI systems of registration, trademark law registration, and case law relating to unfair competition law. Therefore, facilitat ing GI protection via a multilateral registration system necessarily refers to the implementation of existing obligations and not to the creation of new ones.

Consequently, in order to "facilitate" the legal protection prescribed by Section 3 of Part II of the TRIPS Agreement, a multilateral system of notification and registration would help administrations to implement, and producers and consumers to avail themselves of, the legal protection without creating new substantive obligations going beyond the existing requirements of the TRIPS Agreement.

The proposals tabled by the EC and their Member States (IP/C/W/107/Rev.1) and Hungary (IP/C/W/255) advanced a system whereby no new substantive obligations are imposed on WTO Members. Yet, those proposals, via a presumption of eligibility for registered GIs, make GI protection easier to implement. Asking those using names notified by other countries to defend their case first before local courts discourages piracy and benefits the entire spectrum of interested parties: producers, consu mers and administrations.

Producers intending to conduct a policy of international expansion can make cost savings when defending their names around the world. Occasional free-riding on notified names will be discouraged as producers using GIs notified by other countries will have to prove their case before domestic courts first (and incur the associated litigation costs) if asked to do so.

Consumer associations with less resources than producers and yet willing to prevent consumer deception can more easily defend their interests against those who market their products using names notified by others to the WTO.

Resulting from that incentive against misuses, usurpation will diminish and, in turn, litigation (and administration costs) will decrease. Public administrations will have timely information that will allow them, for example, to not register trademarks containing GIs as prescribed by Article 23.2 of the TRIPS Agreement.

Conversely, the proposal of Canada, Chile, Japan and the United States (IP/C/W/133/Rev.1) advances a system where the protection of GIs is not necessarily "facilitated". Publishing a list of GIs exclusively for information purposes does not guarantee that the protection will be "facilitated".

That proposal states that national authorities will be bound to refer to that list but provides for no mechanism to monitor such obligation. Furthermore, no effect is attached to the observance of that list, if national authorities do look at it at all. In any event, national authorities, even if they refer to that list, can choose to ignore it in their domestic administrative decisions.

Yet, producers using notified names may rely on the possibility that national authorities, under that proposal, do refer to the list and start litigation. Legal uncertainty surrounding the effect of that proposal will increase litigation and eventually, administration costs.

Finally, the approach as suggested in the proposal of Canada, Chile, Japan and the United States brings no benefits to consumers, who remain as unprotected as before. This proposal does not bring any added value to the legal standing of consumers, who will continue to witness wide misuse of names in their territories.

A Multilateral System of "Notification" and "Registration"

Article 23.4 of the TRIPS Agreement demands the establishment of a multilateral system of "notification" and "registration".

On the one hand, "notification" suggests that a preliminary phase prior to "registration" shall occur. In this sense, notification clearly suggests the "application" phase that would allow the body carrying out the registration to gain awareness of the applicant's intention to see a name being registered.

On the other hand, "registration", as suggested above, refers to a specific way of implementing the TRIPS requirement that differs, for example, from the common law approach based on case law. In the US, for example, implementation of Section 3 of Part II of the TRIPS Agreement and legal protection for GIs is obtained via the registration of names as certification trademarks. Registration normally carries legal protection, even in the US system of certification marks although, as we wil l see, not in the proposal of Canada, Chile, Japan and the United States.

These two prongs of the multilateral system should be clearly distinguished. The functions and effects attached to both phases of the process should also be clearly differentiated.

The proposals made by the EC and their Member States (IP/C/W/107/Rev.1) and Hungary (IP/C/W/255) suggest that "notification" would consist of the process whereby participating WTO Members would inform and transmit their GIs for distribution among WTO Members and begin the period for examination of those GIs by the WTO membership. "Registration" would, in turn, signify the conclusion of the process and the insertion of the name in the WTO register along with any objections that might have been made known.

Conversely, the proposal of Canada, Chile, Japan and the United States (IP/C/W/133/Rev.1) makes no clear distinction between those phases. Notification and registration are only one single phase in which names sent by the national authorities would all be ultimately recorded in a database. That proposal makes not attempt to provide a differentiated meaning to those two terms.

A "Multilateral" system for GIs "eligible for protection in those members participating in the System"

Article 23.4 of the TRIPS Agreement foresees a system that is both "multilateral" and envisions protection for geographical indications "eligible for protection in those Members participating in the system".

Determining the meaning of the term "multilateral" can only be done by contrasting it with the word "plurilateral". In the context of the WTO, "plurilateral" (e.g., Government Procurement Agreement) is understood as referring to a system in which participation is entirely voluntary. Conversely, "multilateral" systems are understood to be instruments by which all Members are bound.

Article 23.4 of the TRIPS Agreement also refers to geographical indications "eligible for protection in those Members participating in the system". These suggest that Members will be free to participate in the system if they want their geographical indications to enjoy the benefits of it.

The proposals made by the EC and their Member States (IP/C/W/107/Rev.1) and Hungary (IP/C/W/255) attempt to make a balance by making some of the effects of the system applicable to all WTO Members and limiting other effects to only participating Members.

While this matter will be treated at length at the Special Session of September, these two proposals advance that participating Members will provide a presumption of validity to notified and unopposed geographical indications. On the other hand, under the EC proposal, for example, notified and unopposed geographical indications will not see their protection refused, in all Members, on the grounds that they do not meet the definition (Article 22.1 TRIPS), that they falsely represent to th e public their true origin - false homonymous - (Article 22.4) or that they are "the term customary in common language as the common name for such goods or services" (Article 22.6).

The proposal of Canada, Chile, Japan and the United States (IP/C/W/133/Rev.1) also seems to make a similar distinction between participating and non-participating Members. That proposal suggests that authorities of participating Members "shall" look at the list, whereas authorities of non-participating Members "are free" to look at the list. Yet, as there is no mechanism monitoring whether national authorities do look at the list or not, in practice, such distinction disappears.

Conclusion

In light of the above, we conclude that only the proposals tabled by the EC and their Member States (IP/C/W/107/Rev.1) and Hungary (IP/C/W/255) make a genuine attempt at creating a multilateral system of notification and registration of geographical indications in conformity with the requirements of Article 23.4 of the TRIPS Agreement.

Furthermore, only those proposals create a useful mechanism to facilitate the goals enshrined in Section 3 of Part II of the TRIPS Agreement on "geographical indications" for producers, consumers and national administrations.

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